COMMONWEALTH OF MASSACHUSETTS

APPEALS COURT

18-P-653

COMMONWEALTH

vs.

BRIAN MARSHALL.

MEMORANDUM AND ORDER PURSUANT TO RULE 1:28

The defendant was convicted of assault and battery, and strangulation or suffocation, of his daughter as a result of an altercation in an apartment that they shared. On this direct appeal the defendant claims that he received ineffective assistance of counsel, listing a series of alleged failures and misjudgments by counsel. He also argues that the judge was required to give a specific unanimity instruction as to the basis for the assault and battery charge. We affirm.

Background. We recite the facts as the jury could have found them, drawing all reasonable inferences in the light most favorable to the Commonwealth. See Commonwealth v. Javier, 481 Mass. 268, 270 (2019). The defendant moved in with his adult daughter in October of 2015. After living together for several months, the relationship began to deteriorate. On January 6,

2016, the daughter confronted the defendant about eating some of her food, and an argument ensued.

The argument began in the doorway of the defendant's bedroom. The defendant attempted to close the door while his daughter stood on the threshold of the room. The daughter resisted and the two began pushing the door back and forth until the defendant pushed so forcefully that he caused his daughter to stumble backwards onto the floor. The defendant then got on top of his daughter and held her down with his knee on her torso. He then wrapped his hands around her neck and began choking her. The defendant eventually released his daughter and she was able to call the police, while the defendant retreated into his bedroom.

The Commonwealth's witnesses were the daughter and one of the officers who responded to the scene. The defendant testified in his defense,[1] and the landlord of the apartment also testified. The defense theory was that the defendant acted in self-defense,[2] and that the daughter fabricated her account of

[1] During direct examination the defendant claimed that he recorded his interactions with the police officers when they arrived following the incident, and that those recordings, along with another recording of the daughter yelling at the defendant on a separate occasion, were seized by the police during his arrest and never returned. The defendant claimed that he had a receipt for the items that were confiscated; however, the defendant did not introduce the receipt at trial.

[2] Defense counsel argued self-defense in closing and requested a self-defense instruction.

the incident in order to force the defendant out of the apartment. Defense counsel also sought to discredit the daughter's testimony by highlighting inconsistencies in her account of the incident, and by undermining her credibility with her prior criminal convictions on unrelated matters.

The defendant was convicted on one count of assault and battery and one count of strangulation or suffocation. The defendant timely appealed, but did not move for a new trial. Instead, on direct appeal the defendant argues that his counsel was ineffective, and that the court erred by failing to give a unanimity instruction with respect to the basis for the assault and battery charge.

Discussion. 1. Ineffective assistance of counsel. To show ineffective assistance, the defendant must demonstrate that counsel's conduct fell measurably below that of the ordinary, fallible lawyer and that he was prejudiced by that error. See Commonwealth v. Saferian, 366 Mass. 89, 96 (1974). The preferred method for raising an ineffective assistance claim is through a motion for new trial. See Commonwealth v. Davis, 481 Mass. 210, 222 (2019). A claim for ineffective assistance that is raised on direct appeal and that is based solely on the trial record, as here, is in its "weakest form" because it is "bereft of any explanation by trial counsel for his actions and suggestive of a strategy contrived by a defendant viewing the

case with hindsight." Commonwealth v. Gorham, 472 Mass. 112, 116 n.4 (2015), quoting Commonwealth v. Peloquin, 437 Mass. 204, 210 n.5 (2002). "Relief may be afforded on such a claim 'when the factual basis of the claim appears indisputably on the trial record.'" Gorham, supra, quoting Commonwealth v. Zinser, 446 Mass. 807, 811 (2006).

Here, the defendant raises a long list of alleged failures by trial counsel, which we will address serially below. None of them, individually or collectively, satisfies the standards for ineffective assistance of counsel.

First, the defendant argues that counsel was ineffective because counsel failed to enter a transcript of the daughter's 911 call in evidence. The audio version of the 911 call was presented to the jury, but the defendant contends that the transcript could have been used to impeach the daughter's trial testimony -- for example, by pointing out that she refused medical attention at the time.

"[G]enerally, the failure to impeach a witness does not, on its own, constitute ineffective assistance." Commonwealth v. Valentin, 470 Mass. 186, 190 (2014). Moreover, it is not clear on the record that a transcript of the 911 call was ever in defense counsel's possession, and we are without any evidence

from counsel that could resolve the matter.[3] In any event, as noted the audio of the 911 call was admitted in evidence and played for the jury. Defense counsel accordingly was able to cross-examine the daughter regarding inconsistencies between her trial testimony and the statements she made on the 911 call. The absence of a transcript did not amount to ineffective assistance.

Second, the defendant argues that defense counsel made an extreme strategic error in deciding to impeach the daughter with her prior convictions -- two convictions of larceny, two convictions of leaving the scene of an accident, and one conviction of unauthorized use of a motor vehicle. The defendant argues that the prior convictions had little chance of undermining the daughter's credibility, and that by using the daughter's prior convictions counsel opened the door for the prosecutor to introduce the defendant's prior convictions -- two convictions of intimidation of a witness, and one conviction of forgery -- which arguably were more relevant to the jury than the daughter's convictions.

To satisfy the first prong of Saferian, counsel's tactical decision to use the daughter's prior convictions must have been "manifestly unreasonable when made." Commonwealth v. Lally, 473

[3] On appeal the defendant has not provided us with a transcript of the call.

Mass. 693, 706 (2016), quoting Commonwealth v. Kolenovic, 471 Mass. 664, 674 (2015). We cannot so conclude on this record. Once again, without the benefit of a statement from counsel we cannot fully assess his tactical rationale. See Gorham, 472 Mass. at 116 n.4. Nevertheless, the defense theory was that the defendant acted in self-defense, and that the daughter contrived her account of what occurred. Defense counsel undoubtedly was looking for ways to discredit the daughter; the daughter's prior convictions, for theft crimes and leaving the scene of an accident, were probative of her truthfulness and furthered counsel's overall strategy.[4] See Commonwealth v. Sheeran, 370 Mass. 82, 89 (1976). Moreover, the decision to impeach the daughter with prior bad acts, knowing that it would open the door to similar questioning of the defendant, was a judgment call with obvious pros and cons. On this record, we cannot say that that decision was manifestly unreasonable when made. See Kolenovic, 471 Mass. at 674 ("The manifestly unreasonable test . . . is essentially a search for rationality in counsel's strategic decisions").

Third, the defendant suggests that defense counsel manifestly erred by eliciting testimony from the defendant that he made audio and video recordings of his interactions with the

[4] In closing defense counsel argued that the daughter was not credible due, in part, to her past convictions.

police and with his daughter, and testimony that these recordings were seized by the police and never returned.[5] The defendant argues that by bringing forward this testimony, his counsel actually undermined the defendant's credibility because counsel did not adduce any additional evidence, such as a receipt or additional witnesses, to substantiate the claim that the recordings were seized by the police and never returned.

Once again, we see no manifestly unreasonable decision-making or conduct. Again, the defendant has adduced no testimony from defense counsel as to why he brought up the recordings, and we have not been provided with any context as to what defense counsel may have been told about the recordings before he inquired. Sometimes counsel inquire based on what their clients tell them, only to find out during trial that evidence is not available. There is nothing in the record as to what defense counsel may, or may not, have thought he was able to prove. See Gorham, 472 Mass. at 116 n.4. Moreover, the defendant has not shown that the testimony regarding the recordings played any significant role in the jury's verdict, as

[5] On the first day of trial defense counsel hinted at this line of questioning when he asked the responding officer whether the defendant had set up recording devices in his room and whether the police seized any of those devices when the defendant was arrested. The officer testified that the defendant did in fact record their encounter, but that the police did not seize the tape.

the recordings were not mentioned by either side in their opening or closing arguments.

Fourth, the defendant argues that his counsel's cross-examination of his daughter, and the numerous sidebars that occurred at trial, were so incompetent and disruptive that his defense could not be coherently presented. Once again, the defendant's argument fails as a matter of proof. All that is before us is the bare transcript -- there is no testimony from counsel, nor is there any expert testimony regarding counsel's performance. After review of the record, we do not agree with the defendant's characterization that it shows manifest incompetence. See id. No doubt the cross-examination could have gone more smoothly, but that is true of many cross-examinations, and the daughter was a difficult witness to control. Moreover, the record shows that counsel successfully brought out several points that undermined the daughter's credibility.[6]

As for the numerous sidebars, they also cannot lead to a finding of ineffective assistance here. Sidebars occur in every

[6] For example, counsel was able to highlight numerous discrepancies in the daughter's testimony, including discrepancies between the daughter's account of the assault when she sought a restraining order, and her later testimony at trial. Counsel also was able to elicit testimony that the daughter refused medical attention after claiming to be injured and distraught, and counsel impeached the daughter with her prior convictions.

trial, and although they can be disruptive, it would be the rare case indeed where they equate to ineffective assistance. Moreover, the judge thoroughly instructed the jury not to draw any inferences from the objections, sidebars, or evidentiary rulings at trial, and the jury are presumed to have followed those instructions.[7] See Commonwealth v. Maynard, 436 Mass. 558, 571 (2002).

2. Specific unanimity instruction. The defendant next argues that his conviction of assault and battery should be vacated because the jury were not instructed that they must unanimously agree on which specific act or acts constituted the assault and battery. The defendant contends that the jury could have found him guilty of assault and battery based on any one of three potential acts -- (1) the push with the door, (2) placing a knee on his daughter's chest, and (3) choking her -- and that there is no way to determine whether the jury were unanimous in finding guilt based on any one of those three acts. Because the defendant did not request this instruction, or object to its absence, we review to determine whether the missing instruction

[7] The defendant also contends that counsel erred by not filing a motion for required finding of not guilty at the close of all the evidence. This argument fails, among other reasons, because the defendant does not argue insufficiency of the evidence on appeal. The defendant has made no attempt to show how he may have been prejudiced by the failure to file the motion.

created a substantial risk of a miscarriage of justice. See Commonwealth v. Shea, 467 Mass. 788, 798 (2014).

We do not think a specific unanimity instruction was required here, see Commonwealth v. Pimental, 54 Mass. App. Ct. 325, 329 (2002), but in any event the lack of such an instruction did not give rise to a substantial risk of a miscarriage of justice. See Shea, 467 Mass. at 798. A specific unanimity instruction is not warranted "where the facts show a continuing course of conduct, rather than a succession of clearly detached incidents." Pimental, supra. The facts at issue here show a continuing course of conduct. The incident began with the defendant and his daughter pushing a door back and forth until the defendant knocked his daughter onto the floor. The defendant immediately got on top of his daughter, placed his knee on her torso, and then grabbed her neck and began choking her. He released her shortly after and the incident was over. The entire incident appears to have lasted at most a matter of a minute or two, there was no break between any alleged acts, and the entire incident occurred in essentially the same space -- between the bedroom door (where the incident began) and the kitchen (where it ended). There was

no substantial risk that justice miscarried.[8] See Shea, 467 Mass. at 798.

Judgments affirmed.

By the Court (Maldonado, McDonough & Englander, JJ.[9]),

Joseph F. Stanton

Clerk

Entered: July 30, 2019.

[8] We also note that the lack of an objection, or a request for the instruction, may have been a tactical decision by counsel. See Commonwealth v. Proulx, 61 Mass. App. Ct. 454, 461 (2004) (noting that whether failure to object was reasonable tactical decision is relevant in determining whether there was substantial risk of miscarriage of justice). A request that the jury separately consider each act could have had the effect of highlighting the prosecution's evidence, and could have undermined the defendant's self-defense strategy by raising the question whether the defendant was acting in self-defense during each act.

[9] The panelists are listed in order of seniority.